FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 3 1980
MICHAEL RODAK, JR., CLERK

No. 79-602

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD W. AGINS AND BONNIE G. AGINS,
APPELLANTS

v.

CITY OF TIBURON

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

JACQUES B. GELIN
RICHARD JAMES LAZARUS
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Questions presented	1
Interest of the United States	2
Statement	3
Summary of argument	7
Argument	12
I. A zoning ordinance that is designed in part to preserve open space from encroaching development and that restricts development of land to the construction of no more than one single-family dwelling per acre does not constitute a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments	12
A. A zoning ordinance having a substantial relation to the public welfare does not take a landowner's property in violation of the Fifth and Fourteenth Amendments where a reasonable beneficial use of the property is permitted	12
B. The City's ordinance does not effect a taking of appellants' property	19
1. Only facial validity of the ordinance is at issue	19
2. The ordinance promotes the public interest in sound land use planning	21

Argument—Continued

	Page
3. The ordinance does not leave appellants without a reasonable beneficial use of their land	25
II. The Fifth and Fourteenth Amendments do not require that a state court afford a remedy in damages if plaintiffs allege and prove that a zoning ordinance constitutes an unconstitutional taking of their property, where the remedies of declaratory relief and mandamus are available	28
A. Introduction	28
B. A zoning ordinance deemed invalid as a taking of property without compensation is not the equivalent of an exercise of the power of eminent domain	32
C. The equitable remedies available in the California courts are adequate remedies for claims that a zoning ordinance deprives a landowner of substantially all beneficial use of his property	38
D. Public policy considerations support the California Supreme Court's determination of the remedy issue	42
Conclusion	47

CITATIONS

Cases:

	Page
Abood v. *Detroit Board of Education*, 431 U.S. 209	39
Andrus v. *Allard*, No. 78-740 (Nov. 27, 1979)	17
Armstrong v. *United States*, 364 U.S. 40	15
Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388	40
Block v. *Hirsh*, 256 U.S. 135	16, 35
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673	39
Brown v. *Pitchess*, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204	31
Dale v. *City of Mountain View*, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520	25
Davis v. *Passman*, 442 U.S. 228	34, 40
Dugan v. *Rank*, 372 U.S. 609	34, 36
Eastport Steamship Corp. v. *United States*, 372 F.2d 1002	42
Euclid v. *Ambler Realty Co.*, 272 U.S. 365	7, 8, 12, 13, 15, 18, 23
Exxon Corp. v. *Governor of Maryland*, 437 U.S. 117	15
Ferri v. *Ackerman*, No. 78-5981 (Dec. 4, 1979)	32
Fresno v. *California*, 372 U.S. 627	36
Goldblatt v. *Town of Hempstead*, 369 U.S. 590	24
Gorieb v. *Fox*, 274 U.S. 603	23
Graham v. *City of Biggs*, 96 Cal. App. 3d 252, 157 Cal. Rptr. 761	31
Hadacheck v. *Sebastian*, 239 U.S. 394	18

Cases—Continued — Page

Hecton v. *People ex rel. Department of Transportation*, 58 Cal. App. 3d 653, 130 Cal. Rptr. 230 25
HFH, Ltd. v. *Superior Court of Los Angeles County*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365, cert. denied, 425 U.S. 904 ..... 30, 31
Hooe v. *United States*, 218 U.S. 322 34
Hurley v. *Kincaid*, 285 U.S. 95 ..... 36, 37
Igna v. *City of Baldwin Park*, 9 Cal. App. 3d 909, 88 Cal. Rptr. 581 20
Iowa-Des Moines National Bank v. *Bennett*, 284 U.S. 239 39
Jacobs v. *United States*, 290 U.S. 13 32
Jacobson v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901 ..... 32, 43, 44
Kaiser Aetna v. *United States*, No. 78-738 (Dec. 4, 1979) 17
Mapp v. *Ohio*, 367 U.S. 643 39
Martinez v. *California*, No. 78-1268 (Jan. 15, 1980) 32
Mellon v. *McCafferty*, 239 U.S. 134 40
Miller v. *Schoene*, 276 U.S. 272 18
Miranda v. *Arizona*, 384 U.S. 436 ..... 39, 43
Monell v. *New York City Department of Social Services*, 436 U.S. 658 ..... 44, 45
Mosca v. *United States*, 417 F.2d 1382 42
Murdock v. *City of Memphis*, 87 U.S. (20 Wall.) 590 37-38
Nebbia v. *New York*, 291 U.S. 502 15
Owen v. *City of Independence*, 589 F.2d 335, cert. granted, No. 78-1779 (Oct. 1, 1979) (argued Jan. 8, 1980) 44

Cases—Continued — Page

Pan Pacific Properties Inc. v. *County of Santa Cruz*, 81 Cal. App. 3d 244, 146 Cal. Rptr. 428 20
Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 ..... *passim*
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 27
Phyle v. *Duffy*, 334 U.S. 431 ..... 32, 40
Pierce Oil Corp. v. *City of Hope*, 248 U.S. 498 25
Poindexter v. *Greenhow* [*The Virginia Coupon Cases*], 114 U.S. 270 39
Portsmouth Co. v. *United States*, 260 U.S. 327 15
Regional Rail Reorganization Act Cases, 419 U.S. 102 37
Rossiter v. *Benoit*, 88 Cal. App. 3d 706, 152 Cal. Rptr. 65 31
Sala v. *County of Suffolk*, 604 F.2d 207, petition for cert. pending, No. 79-620 .. 44
United States v. *Causby*, 328 U.S. 256 14
United States v. *Central Eureka Mining Co.*, 357 U.S. 155 19
United States v. *Clarke*, No. 78-1693 (Mar. 18, 1980) 33, 34, 41
United States v. *Dickinson*, 331 U.S. 745 .. 33
United States v. *Dow*, 357 U.S. 17 ..... 33, 34
United States v. *General Motors Corp.*, 323 U.S. 373 17
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 36
United States v. *Willow River Power Co.*, 324 U.S. 499 17

Cases—Continued — Page

Village of Belle Terre v. *Boraas*, 416 U.S. 1 23
Ward v. *Board of County Comm'rs*, 253 U.S. 17 39
Woods v. *Nierstheimer*, 328 U.S. 211 40

Constitution and statutes:

United States Constitution:

Fifth Amendment 1, 2, 5, 9, 12, 28, 34
Fourteenth Amendment 1, 2, 5, 12, 28, 34

Airport and Airway Development Act of 1970, 49 U.S.C. 1701 *et seq.* 2
Clean Water Act, 33 U.S.C. (and Supp. I) 1251 *et seq.*:

33 U.S.C. (Supp. I) 1251(b) 2
33 U.S.C. (Supp. I) 1251(g) 2
33 U.S.C. 1288 ..... 2, 46

Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.* 45

Section 302(c), 16 U.S.C. 1451(c) 45
Section 302(h), 16 U.S.C. 1451(h).... 2
Section 305, 16 U.S.C. 1454 45

Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. 3334 3
Environmental Quality Improvement Act of 1970, 42 U.S.C. 4371 2
Housing and Community Development Act of 1974, 40 U.S.C. 461 3
National Environmental Policy Act of 1969, 42 U.S.C. 4331(a) 2

Constitution and statutes—Continued — Page

National Flood Insurance Act of 1968, 42 U.S.C. 4102 3
National Historic Preservation Act of 1966, 16 U.S.C. 470 2
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6941-6949 2
Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590c 3
42 U.S.C. 1983 .....31, 32, 44, 45
Cal. Civ. Proc. Code § 1095 (West Cum. Supp. 1980) 31
Cal. Evid. Code § 452 (West 1966) 25
Cal. Gov't Code:

§ 818.2 (West 1966) 31
§ 65560 *et seq.* (West Supp. 1980).... 3
§ 65561(b) (West Supp. 1980) 23
§ 65912 (West Supp. 1980) 38

Miscellaneous:

R. Anderson, *American Law of Zoning* (1976) 23
F. Bosselman, D. Callies & J. Banta, *The Taking Issue* (1973) 44
Comment, *The Clean Water Act and Related Developments in the Federal Water Pollution Control Program During 1977*, 2 Harv. Envt'l L. Rev. 103 (1978) 46
Haar, "*In Accordance with a Comprehensive Plan*," 68 Harv. L. Rev. 1155 (1955) 24
Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) 43

Miscellaneous—Continued	Page
Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109 (1969)	39
Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181 (1969)	39
Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917)	16
Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913)	16
2A *Moore's Federal Practice* (2d ed. 1979)	25
Note, *Eldridge* v. *City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 Hastings L.J. 1569 (1977)	44
Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439 (1974)	43, 44
Note, *State Remedies for Federally-Created Rights*, 47 Minn. L. Rev. 815 (1963)	39
2 N. Williams, *American Planning Law—Land Use and the Police Power* (1974)	23

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS AND BONNIE G. AGINS,
APPELLANTS

v.

CITY OF TIBURON

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether a zoning ordinance restricting development of appellants' property to no more than one single-family dwelling per acre constitutes a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments.

2. Whether the Fifth and Fourteenth Amendments require that a state court afford a remedy in damages if plaintiffs allege and prove that a zoning ordinance constitutes an unconstitutional taking of their property, where declaratory relief and mandamus are available.

INTEREST OF THE UNITED STATES

This case concerns the validity of a municipal zoning ordinance enacted as part of a comprehensive land use plan to protect a part of the area's remaining open spaces from the encroachment of dense commercial and residential development. It is challenged as a taking under the Fifth and Fourteenth Amendments, and appellants seek to compel the payment of damages in what they style an action for inverse condemnation.

Should appellants prevail, regulatory measures in numerous federal programs, including programs dependent on the employment of traditional land use controls, could be subject to similar takings challenges. Moreover, in many federal environmental programs Congress has adopted a policy of encouraging state and local governments to enact the necessary regulatory programs, including traditional land use controls—in some cases expressly placing the responsibility for such enactments on these governments. See, *e.g.*, provisions of the Airport and Airway Development Act of 1970, 49 U.S.C. 1701 *et seq.*; the Clean Water Act, 33 U.S.C. 1288, and 33 U.S.C. (Supp. I) 1251(b), 1251(g); the Coastal Zone Management Act of 1972, 16 U.S.C. 1451(h); the Environmental Quality Improvement Act of 1970, 42 U.S.C. 4371; National Environmental Policy Act of 1969, 42 U.S.C. 4331(a); the National Historic Preservation Act of 1966, 16 U.S.C. 470; and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6941-6949. In other areas, Congress offers financial

assistance and other encouragement to promote local land use planning. See, *e.g.*, provisions of the Demontration Cities and Metropolitan Development Act of 1966, 42 U.S.C. 3334; the National Flood Insurance Act of 1968, 42 U.S.C. 4102; the Housing and Community Development Act of 1974, 40 U.S.C. 461; and the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590c.

A holding by this Court that the ordinance at issue in this case is constitutionally infirm as applied to appellants might put in doubt the constitutionality of some of these federal and federally assisted programs; and a holding that the Constitution requires that a remedy in damages be made available to any plaintiff who proves that a land use law is invalid under the Takings Clause as applied to his property could exert a chilling effect on the good faith exercise of the police power, impede the public budgeting process, and threaten the solvency of many local governments that attempt to carry out land use policies of federal environmental programs.

STATEMENT

1. Appellants own five acres of unimproved land in the City of Tiburon, Marin County, California (A. 4). On June 28, 1973, in compliance with a state law requiring cities and counties to include "open space elements" in their general land use plans (Cal. Gov't Code § 65560 *et seq.* (West Supp. 1980)), the City enacted Ordinance No. 124 N.S., designating appellants' land as coming within an "RPD-1" zone, meaning that the land is restricted

to certain authorized uses, namely "(1) [o]ne-family dwellings[,] (2) [o]pen space uses [, and] (3) [a]ccessory buildings and accessory uses" (A. 5; J.S. App. 3, 30-32, 45-46).[1] Appellants' parcel was among more than 250 acres in the City (some 15% of its land area) designated RPD-1 by the ordinance (Tiburon zoning map, reprinted at C. Tr. 21M).[2] Under the ordinance, appellants are entitled to use their five acres of land for one single-family dwelling, and, on application, the City may approve construction of up to four additional single-family dwellings, for a total of five on five acres (J.S. App. 3, 31-36).[3]

On October 15, 1973, appellants filed a claim with the City demanding $2 million for the injury allegedly done to their property by passage of the ordinance (J.S. App. 3-4, 7, 21-23). The City rejected the claim (*id.* at 24). On December 4, 1973, six months after

---

[1] Ordinance 124 N.S. specifies the areas to be placed into particular zoning categories; the specification of uses permitted for land zoned as RPD-1 appears in Ordinance No. 123 N.S., enacted the same day (J.S. App. 20-40).

[2] "C. Tr." refers to the Clerk's Transcript of the record on appeal from the Superior Court of California, County of Marin.

[3] It appears that, when appellants bought their land in 1968, the then-applicable zoning ordinance similarly allowed them to build only five homes on the five acres (Appendix C to the brief filed by the Conservation Foundation, *et al.* as amici curiae). Whether appellants are now permitted to build five dwellings or fewer, depends upon the particular architectural design contemplated and the results of the required environmental reviews. The ordinance provides standards that the City must consider to determine the appropriate maximum allowable density (J.S. App. 3, 32-36). Appellants have not applied to the City for a permit (*id.* at 3).

the challenged ordinance was enacted, the City filed a complaint in eminent domain to acquire appellants' property, but later abandoned the proceedings (J.S. App. 4; A. 9-10).

2. On June 16, 1975, appellants filed suit against the City in the Superior Court of California, County of Marin, alleging, in a first cause of action, a claim in inverse condemnation for two million dollars in damages, and requesting, in a second cause of action, declaratory relief, asserting that Ordinance No. 124 N.S. constituted a taking in violation of the Fifth and Fourteenth Amendments (A. 3-15). Appellants' complaint alleged generally that the ordinance "completely destroyed the value of [their] property for any purpose or use whatsoever" (A. 7). They also alleged, however, that the general area in which their property was situated is "the most desirable place to live in the State of California and [has] the highest land value per acre for suburban areas in the State of California" (A. 3). They further alleged that their particular parcel is ideal for residential development, having "magnificent views of the San Francisco Bay and the scenic surrounding areas" and "the highest market values of all lands within the city" (A. 4).

The City answered with a general demurrer to both claims (A. 25). The trial court sustained the demurrer as to the inverse condemnation claim without leave to amend and it sustained the demurrer to the claim for declaratory relief with leave to amend within 10 days (A. 26). Appellants declined to amend and appealed to the Court of Appeal for the First Appellate District, which affirmed the trial court's

dismissal of the claim for declaratory relief and reversed as to dismissal of the inverse condemnation claim (App. Br. 8).

3. On the City's appeal to the California Supreme Court, that court, one justice dissenting, vacated the decision of the Court of Appeal and affirmed the trial court's dismissal of both claims for relief (J.S. App. 1-24).

The court concluded that when a public agency has adopted a zoning ordinance that substantially limits use of landowners' property, the landowners may not recover damages on the theory of inverse condemnation; rather, they may challenge the constitutionality of the ordinance either through an action for declaratory relief or mandamus. The court reasoned that an invalid exercise of the police power could not be converted at the landowner's option into a valid exercise of the power of eminent domain, giving rise to a right to payment of just compensation (*id.* at 5). Recognizing that an exercise of the police power to promote the public health, safety, or welfare may amount to a "taking" if it would destroy substantially all of a landowner's use of the land in question, the court noted that the customary remedy was invalidation of the regulation for failure to provide compensation (*id.* at 7-8). It further concluded that if local governments that enacted land use laws determined by a court to have exceeded limits of the police power in that respect (and thus to constitute a "taking") were to be held liable in damages on a theory of inverse condemnation, this would deter

valid land use regulation, out of fear that a court might hold it to be a taking and require, in effect, that the government purchase land that it had intended only to regulate (*id.* at 10-12).

Second, the court held that, in any event, because the zoning restriction allowed appellants to build up to five dwellings on their property, its effect, as a matter of law, was not to deprive them of substantially all reasonable use of their land, and it was not, therefore, unconstitutional (J.S. App. 12-13). Finally, the court rejected appellants' assertion that the City's "precondemnation activities"—the authorization of studies recommending acquisition of appellants' land and the filing and subsequent abandonment of an eminent domain proceeding—"were so unreasonable as to provide a separate basis for an action in inverse condemnation" (*id.* at 13-14).

The dissenting justice asserted that appellants had alleged sufficient facts to make out their takings claim, that a damage remedy was constitutionally required where such claims were proven, and that without such a remedy available, government agencies would be encouraged to enact land use plans similar to the one at issue (*id.* at 16-24).

SUMMARY OF ARGUMENT

I.

Under principles set forth in this Court's decisions in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and *Penn Central Transportation Co.* v. *New York*

City, 438 U.S. 104 (1978), a land use regulation such as a zoning ordinance is not deemed a taking without just compensation under the Fifth Amendment where the regulation is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" (*Euclid* v. *Ambler Realty Co.*, *supra*, 272 U.S. at 395) and does not deprive the owner of every reasonable beneficial use of his property. Thus, the fact that such a regulation may produce a severe diminution in the value of property, or deprive the owner of certain profitable uses of that property, does not prove it to be an unconstitutional taking.

Under these principles, the particular factual allegations of the complaint in this case do not establish the unconstitutionality of the City's ordinance. Appellants do not seriously dispute the substantial relation of the ordinance to the public welfare, *i.e.*, the protection of remaining open space areas in the City from the encroachment of dense development. Their conclusory allegation that the ordinance, and the City's open space planning activities generally, have left their parcel without value for any use is contradicted by the terms of the ordinance, which permit construction of up to five single-family dwellings on the parcel, and by particular allegations in the complaint that the parcel has the highest market value of land in an area that itself includes the most valuable suburban land in the State and that the parcel is well suited to residential development. Accordingly, the California Supreme Court was correct in finding that the

ordinance was not a taking within the meaning of the Fifth Amendment and in affirming the trial court's dismissal of the complaint.

II.

Appellants contend that when a state court determines that a zoning ordinance has so exceeded the limits of the police power as to constitute an unconstitutional taking of property, the court is not free to limit the plaintiffs to declaratory relief and mandamus but must afford plaintiffs the right to recover damages on a theory of inverse condemnation. Their position rests on several flawed arguments.

First, they incorrectly argue that a legislature's enactment of a law that regulates uses of property in a manner ultimately deemed by a court to constitute a taking is the equivalent of an exercise of the power of eminent domain to acquire property. From this they conclude that a court may properly compel a government to purchase property it sought only to regulate, albeit in a manner deemed unconstitutional by the court. That proposition is unsupported by precedent. Instead, decisions of this Court on which appellants rely suggest a sensitivity to legislative choice in considering what remedies to give when a statute is found to be invalid under the Takings Clause. A legislature that enacts a zoning ordinance has made a clear choice: it has in effect decided to define property rights rather than to acquire them. If in the present case, contrary to our submission, the City has misjudged the degree to which it may validly

control the density of residential development without resorting to proceedings in eminent domain, it should not be found to have impliedly agreed to purchase property the uses of which it sought only to regulate.

Second, appellants incorrectly suggest that the remedies of declaratory relief and mandamus are inadequate as a matter of constitutional law. No allegations in their complaint support the claim that such relief would be inadequate. If the ordinance were struck down, the restrictions which they allege deprive them of all beneficial use of their property would be lifted; and mandamus would be available to compel the issuance of permits and the like were the City to seek in some way to evade compliance with the decision. In recognition of principles of federalism, this Court has indicated that only when relief offered by a state court for the protection of a federal right is wholly inadequate should a federal court interfere with the state court's remedial discretion. Even in cases brought in federal court against federal officials, this Court has not suggested that a remedy in damages is the sole adequate remedy for a constitutional violation; and there is no authority for the proposition that only a damages remedy provides adequate relief for unconstitutional restrictions on land use imposed by a zoning ordinance.

Third, appellants suggest that state and local governments would enjoy greater flexibility in their policy choices in land use planning if the inverse condemnation remedy were available to developers and others

who challenge land use regulations. In fact, just the opposite is the case. If such an ordinance is invalidated in whole or in part, the enacting body is free to enact an amended ordinance, proceed in eminent domain (if it possesses such powers), or abandon its regulation of the land uses concerned. Under appellants' scheme, a government would be compelled to purchase the property at issue. Compelled purchase not only restricts a government's options in land use planning, it may create budgetary problems that constrain decisions in other areas. And the mere threat of such a remedy may inhibit local governments from devising constitutional land use policies, for fear that a court may disagree with the judgment of corporation counsel on the constitutional validity of regulation. Such inhibitions may discourage the participation of state and local governments in federal environmental programs that depend on implementation through land use controls at the state and local level.

ARGUMENT

I. A ZONING ORDINANCE THAT IS DESIGNED IN PART TO PRESERVE OPEN SPACE FROM ENCROACHING DEVELOPMENT AND THAT RESTRICTS DEVELOPMENT OF LAND TO THE CONSTRUCTION OF NO MORE THAN ONE SINGLE-FAMILY DWELLING PER ACRE DOES NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

A. A Zoning Ordinance Having a Substantial Relation to the Public Welfare Does Not Take a Landowner's Property in Violation of the Fifth and Fourteenth Amendments Where a Reasonable Beneficial Use of the Property is Permitted

In *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), this Court set out the principles applicable to a determination of the facial validity of a zoning ordinance attacked as a violation of the Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment. The specific allegation of the landowners in *Euclid* was that the very existence of the ordinance depressed the value of their property from $10,000 per acre to $2,500 per acre because it prohibited use of that property for the construction of industrial or commercial buildings and apartment houses (272 U.S. at 384-385). This diminution in the value of the property, they alleged, made the ordinance unconstitutional on the ground that it was both "unreasonable and confiscatory" (*id.* at 386).

The Court rejected the argument. It held, first, that the ordinance was a reasonable exercise of the police

power, the test being whether its provisions were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" (*id.* at 395). In reaching this conclusion the Court noted, *inter alia*, the desirability of maintaining "open spaces and attractive surroundings created by the residential character of [a] district" (*id.* at 394); and it found the justification for the many restrictions in the ordinance in the changing conditions of urban life (*id.* at 386-387):

> Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.

Continuing its consideration of the reasonableness of the regulation, the Court next inquired into the injury alleged—the adverse effect on market value of the property allegedly resulting from the mere existence of the ordinance—and concluded that this also was insufficient to establish the unconstitutionality of the ordinance. *Id.* at 395-396.[4]

---

[4] The Court noted that it did not have before it the question of specific damage resulting from the application of particular provisions of the ordinance to particular parcels of the owners' property. *Id.* at 397.

More recently, in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), this Court summarized principles applicable to "takings" claims generally and to claims that a particular law restricting land use is unconstitutional as applied to the property of the one alleging the taking.[5] There the Court discussed a number of factors of particular significance in evaluating taking claims; but the factors fall generally under two headings—the character of the government action and its impact on the particular claimant. *Id.* at 124-128.

As to the first, the Court stated (*id.* at 124) that a taking is much "more readily * * * found when the interference with property can be characterized as a physical invasion by government * * * than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." In instances of the former, not only is the interference direct and manifest, but frequently the government in its "enterprise capacity" acquires assets or otherwise benefits directly from the interference at the claimant's expense. 438 U.S. at 124, 128. See, *e.g.*, *United States* v. *Causby*, 328 U.S. 256, 262-263 n.7 (1946) (low overflights of military

[5] As we explain below (pages 19-20, *infra*), appellants in the present case are barred, by their failure to apply for a permit to build more than one house on their parcel, from attempting to prove that they would be unable to meet the requirements for permission to build the maximum of five permitted by the ordinance. In any event, as we show below, under the tests set out in *Penn Central, supra*, the ordinance would not be unconstitutional even if appellants were allowed to build only one single-family dwelling on their parcel.

planes not only "destroyed property"—by destroying its use as a chicken farm—but also "used part of it"); *Portsmouth Co.* v. *United States*, 260 U.S. 327 (1922) (target fire by military installation across private land). See also *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (no physical invasion, but government's exercise of an option under a ship construction contract held a taking where the government was "the direct, positive beneficiary" of the resulting destruction of materialmen's liens).

Where the asserted interference is "some public program" (*Penn Central, supra*, 438 U.S. at 124)—i.e., a regulation enacted pursuant to the police power—the Court adheres to the *Euclid* test. It inquires whether the regulation has as its objective a "permissible governmental goal" (*Penn Central, supra*, 438 U.S. at 129), and whether the restrictions it imposes are "substantially related to the promotion" of that objective (*id.* at 138).[6] Thus, the Court noted in *Penn Central* (*id.* at 125) that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real

[6] The initial two-stage inquiry may also be regarded as a substantive economic due process test. See, *e.g.*, *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) (statute upheld prohibiting petroleum refiners from operating retail service stations in state); *Nebbia* v. *New York*, 291 U.S. 502 (1934) (convictions for selling milk below state-fixed price upheld).

property interests." It characterized zoning laws as the "classic example" of government action viewed as "permissible * * * even when prohibiting the most beneficial use of the property." *Ibid.* Significantly, the Court rejected the notion that to be lawful a restriction must prohibit some "noxious" use, rather than promote a public benefit (*id.* at 133-134 n.30).

In considering the second major set of factors—the impact on the property owner of the asserted governmental interference—the Court inquires whether the owner is left with any reasonable beneficial use of his property. *Penn Central, supra,* 438 U.S. at 135-138. The "reasonable use" inquiry is sometimes made difficult by the fact that property itself is not easily definable. Property may consist of a myriad of rights, powers, duties, privileges, and disabilities—sometimes linked to a tangible *res,* sometimes not. See generally Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning,* 23 Yale L.J. 16 (1913); Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning,* 26 Yale L.J. 710 (1917).[7]

[7] Theoretically rights in a tangible *res,* such as land, are not superior to rights in intangibles; but as Mr. Justice Holmes observed (*Block* v. *Hirsh,* 256 U.S. 135, 155 (1921)):

> The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.

Decisions of this Court concerned with takings questions reflect this notion, for they speak of property as a "bundle of rights." *Kaiser Aetna* v. *United States,* No. 78-738 (Dec. 4, 1979), slip op. 12; *Andrus* v. *Allard,* No. 78-740 (Nov. 27, 1979), slip op. 14. See also *United States* v. *General Motors Corp.,* 323 U.S. 373, 377-378 (1945). At least where the exercise of the police power is concerned and "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus* v. *Allard, supra,* slip op. 14. See also *United States* v. *Willow River Power Co.,* 324 U.S. 499, 502, 510 (1945). Thus, in *Penn Central,* the Court declined to focus only on the interference of the police power restriction with the use of the air rights above a building designated as a landmark but rather looked at "the parcel as a whole." 438 U.S. at 130-131. Whether a reasonable use of the parcel remained was the focus of the Court's inquiry. *Id.* at 131, 135-138. Similarly, in *Andrus* v. *Allard,* the Court did not find that an unconstitutional interference had occurred when government regulation prohibited sale of an owner's property, because, as it observed (slip op. 14), the property owners "retain[ed] the rights to possess and transport their property, and to donate or devise" it.[8]

[8] This Court's decision in *Kaiser Aetna* v. *United States, supra,* is not to the contrary. The court focused in that case on an interference with the " 'right to exclude' " and found that the federal government's exercise of its navigational servitude,

The upshot is that a mere diminution in the value of property cannot effect a taking. *Penn Central, supra,* 438 U.S. at 131. Thus, this Court has upheld regulations challenged as takings even where the economic impact on the owners is extremely severe. See, *e.g., Miller* v. *Schoene,* 276 U.S. 272 (1928), (cedar trees destroyed in order to prevent spread of disease to area's commercially valuable apple trees); *Euclid* v. *Ambler Realty Co., supra* (75% diminution in value caused by zoning law); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915) (87% diminution in value). A law may prohibit the most profitable uses of property without constituting a taking. So long as any reasonable beneficial use remains, a law valid under the substantive due process test discussed above is not impermissible under the Takings Clause,

---

which threatened the interference, would amount to an unconstitutional taking given the particular circumstances of that case; at least two factors, singly, or in combination, may have been critical to the holding. First, petitioners, at considerable expense, had developed a private pond into a marina, the use of which was offered to boat owners for a fee; and the government's attempt to prohibit petitioners from excluding the general public destroyed the *sole* use for which the marina was economically feasible. Second, the government had consented to the dredging and filling without indicating that any public access condition would be imposed—conduct that the Court characterized as leading to "the fruition of a number of expectancies" (slip op. 15). See also *Penn Central, supra,* 438 U.S. at 124 (emphasizing the significance of "distinct, investment-backed expectations").

despite the absence of any provision for compensation.[9]

Finally, in determining whether there is a remaining beneficial use, it is appropriate to consider the benefits that will accrue to the property owner under the law he is challenging as a taking. Even where a severe burden is imposed on an owner by restrictions on his use, possession, or disposition of property, there may be indirect benefits that will work to his profit in the long term, as the law's objectives come to fruition. See *Penn Central, supra,* 438 U.S. at 134-135, 137.

B. The City's Ordinance Does Not Effect a Taking of Appellants' Property

1. *Only facial validity of the ordinance is at issue*

At the outset, we should note that because appellants failed to apply for permission to build five single-family dwellings on their parcel—the maximum permissible under the ordinance—they are not entitled to attack the ordinance as it *might* specifically affect them should they make such an appli-

---

[9] Circumstances may exist, however, in which even what the owner contends is the sole reasonable beneficial use (because the only profitable use) of property may validly be prohibited without paying compensation. For example, the owner may have no reasonable expectation of using the property in that way because of existing regulatory requirements. See also *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155 (1958) (upholding prohibition, imposed pursuant to the war power, on operation of gold mines).

cation.[10] Under California law, this failure to exhaust administrative remedies restricts them to an attack on the ordinance as facially invalid. See, *e.g.*, *Pan Pacific Properties, Inc.* v. *County of Santa Cruz*, 81 Cal. App. 3d 244, 249-251, 146 Cal. Rptr. 428, 431-433 (1978); *Igna* v. *City of Baldwin Park*, 9 Cal. App. 3d 909, 914-915, 88 Cal. Rptr. 581, 585 (1970). Thus appellants are not entitled to a trial to inquire into how the planning requirements and the standards of the ordinance might affect them. It must be assumed, for purposes of this appeal, that they may build five single-family dwellings and accessory buildings on their parcel.

In any event, under the principles discussed above, it is clear that the enforcement of the ordinance at issue here, which, in the interest of sound municipal land use planning, imposes restrictions on the development of certain open space areas, does not effect a taking of appellants' property without just compensation, even assuming they are not able to build the permitted maximum of five dwellings on their parcel. It is virtually undisputed that the ordinance promotes the public welfare; and despite certain conclusory allegations in their complaint, it seems evident from the specific factual allegations that appellants

[10] Appellants' complaint expressly challenged only the ordinance (No. 124 N.S.) that designates their parcel RPD-1. That ordinance of course, incorporates by reference the ordinance (No. 123 N.S.) that specifies permissible uses for RPD-1 land (see page 4, note 1, *supra*); for simplicity's sake, we shall follow appellants and the California Supreme Court in referring to "the ordinance."

will retain not only a reasonable—but a profitable—use of their property, whatever their success in meeting the planning requirements for building more than one single-family dwelling on the parcel.

2. *The ordinance promotes the public interest in sound land use planning*

Appellants did not, in the court below, dispute the propriety of the objective of the City's ordinance, nor do they seriously do so here.[11] Indeed, since they seek

[11] Appellants assert that the City "is already blessed with ample environmental resources" (App. Br. 40), and they refer pejoratively at one point to "community environmentalist zealots" (App. Br. 42); but in their only discussion of the substantive due process test, which is part of the "takings" inquiry, they notably fail to deny that the restrictions imposed by the ordinance lack a substantial relation to the general welfare (App. Br. 25-26). Instead, they complain that there was no finding by a state tribunal on this question. But such a finding was implicit in the California Supreme Court's ultimate conclusion that the ordinance was constitutionally valid; since appellants did not contend before that court that the objective of preserving open space was not a permissible goal, there was no reason for the Court to discuss the point in detail. Appellants' discussion of this point in their brief in this Court (App. Br. 25-26) confuses the question whether a law has a substantial relation to the public welfare with the quite different question whether it leaves a particular property owner with no beneficial use of his property.

Appellants' suggestion (App. Br. 27-29) that the ordinance was enacted—and the open space plans of consultants published—in order to "facilitate" the City's "acquisition" of the property displays a curious ambiguity in the use of the term "acquisition," and—when analyzed—states no genuine separate claim against the City at all. If appellants are suggesting that the City enacted the ordinance in order to reduce the

to compel the equivalent of an eminent domain action by requiring the City to purchase their land (see Point II, *infra*), it would be inconsistent for them to contend that restricting the land to the uses specified by the ordinance fails to promote a valid public purpose.

Nevertheless, should appellants belatedly undertake to dispute the matter, they would face compelling arguments to the contrary. As this Court has observed, "States and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 129 (1978) (citations omitted). The open space concerns of the City of Tiburon fall squarely within these goals. In re-

---

value of their parcel so that it could be purchased cheaply in eminent domain proceedings, they make nonsense of their central argument that the City is wrongfully *refusing* to acquire their property through such proceedings and must be forced to do so pursuant to the grant of an "inverse condemnation" remedy. If they are contending, instead, that the ordinance is a devious means of avoiding the necessity of paying anything for the land—*i.e.*, of avoiding eminent domain proceedings—they are merely stating their main argument (that this kind of zoning is itself a form of "acquisition") in somewhat different terms. As we explained elsewhere (pages 14-15, *supra*, page 24, *infra*), this second argument reflects a misreading of this Court's decisions regarding takings challenges. In any event, the argument does not assume that preservation of open space areas is an impermissible governmental goal.

We note also that appellants have not alleged that the ordinance was motivated by racial or otherwise invidious discrimination or that it violates any civil rights statutes.

stricting a modicum of land to open space uses and to single-family dwellings, the ordinance is akin to a number of zoning ordinances upheld by this Court. See *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974) (zoning power can legitimately be used to create a "quiet place where yards are wide, people few * * * and the blessings of quiet seclusion and clean air make the area a sanctuary for people"); *Gorieb* v. *Fox*, 274 U.S. 603, 608 (1927) (sustaining propriety of setback regulations that by their terms require open space areas on land); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 394 (1926) (excluding apartment houses from a residential district is a permissible restriction).[12]

The ordinance at issue in this case was, moreover, enacted in response to a state law requiring cities and counties to develop local open-space plans in order to discourage "premature and unnecessary conversion of open-space land to urban uses" (Cal. Gov't Code § 65561(b) (West Supp. 1980)). Because the restrictions in the ordinance are not solely applicable to the property of any one owner, but are part of a comprehensive plan that seeks to achieve balanced land use in the community, the ordinance is not objectionable as an instance of spot-zoning. See *Penn Central*, *supra*, 438 U.S. at 135 n.32. See generally

---

[12] One acre zoning limitations are almost uniformly upheld by courts in the major zoning states. See generally, 2 N. Williams, *American Planning Law—Land Use and the Police Power*, ch. 39 (1974); R. Anderson, *American Law of Zoning* §§ 7.20, 9.60 (1976).

Haar, "*In Accordance with a Comprehensive Plan*," 68 Harv. L. Rev. 1155 (1955).

Finally, because the ordinance is simply a variant of density regulation, a traditional use of the zoning power, it is incorrect to argue, as appellants do (App. Br. 26-27), that the ordinance is an instance of governmental "acquisition" of assets belonging to appellants and others whose land has been zoned RPD-1, accomplished "in the guise of regulation." This Court's discussion in *Penn Central, supra*, of the sorts of "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions," which "have often been held to constitute 'takings'" (438 U.S. at 128), makes it clear that those are cases in which the government itself is directly invading or otherwise using the property. In the present case, as shown, the City has merely acted to prevent appellants and others from developing their land in a manner that would defeat sound urban planning goals. Such action is a classic use of the police power (see *Penn Central, supra*, 438 U.S. at 125) that benefits not the government acting in its enterprise capacity, but the public as a whole.

In sum, it cannot seriously be maintained that the ordinance at issue here is not substantially related to the promotion of the general welfare. Given the severely limited scrutiny of this Court into such questions (see *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595-596 (1962)), leaving the issue essentially undisputed was clearly appellants' wisest course.

As they have asserted, when pursuing another point (App. Br. 40-41): "[S]ound time-tested reasons of public policy respectful of the doctrine of separation of powers, counsel against the judiciary's too-ready constitutional intervention in peculiarly local, often political, land use decisions on an ongoing daily basis." We would qualify that statement only by noting that in recent decades the judiciary has, on the whole, avoided this sort of intervention, as the trial court and the California Supreme Court have done in the present case.

3. *The ordinance does not leave appellants without a reasonable beneficial use of their land*

In their complaint, appellants alleged (A. 7) that the ordinance "has completely destroyed the value of [their] property for any purpose or use whatsoever * * *." Under California demurrer practice, as is the case generally, no court is bound to accept such a conclusory allegation as true, particularly where it is contradicted by the terms of the ordinance put in issue and by other specific factual allegations of the complaint. See *Dale* v. *City of Mountain View*, 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522-523 (1976); *Hecton* v. *People ex rel. Department of Transportation*, 58 Cal. App. 3d 653, 130 Cal. Rptr. 230 (1976); Cal. Evid. Code § 452 (West 1966). See generally, *Pierce Oil Corp.* v. *City of Hope*, 248 U.S. 498, 500 (1919); 2A *Moore's Federal Practice* ¶12.08 & n.4 (2d ed. 1979) (in a motion to dismiss, as in a demurrer, "conclusions of law or unwarranted deductions of fact are not admitted").

Appellants' allegation that their land has been rendered worthless by the ordinance is squarely contradicted by the terms of the ordinance, which permits the construction of one single-family dwelling as of right and up to five such dwellings where planning requirements are met, and by the specific allegation elsewhere in the complaint (A. 4) that residential development is the highest and best use of the land. Appellants' further allegations that land in the general area has "the highest land value per acre for suburban areas in the State of California" (A. 3) and that their parcel in particular has "the highest market value[] of all lands within the city limits" (A. 4) make it evident that the construction and sale of the number of dwellings permitted by the ordinance would hardly be an unprofitable use of the land.

It is, moreover, noteworthy that one of the factors described by the complaint as contributing to the value of appellants' parcel is the existence of "magnificent views of San Francisco Bay and the scenic surrounding areas" (A. 4). As the City zoning map makes clear (C. Tr. 21M), the continued existence of some of those "scenic surrounding areas" is made possible by the very ordinance that appellants attack. Should the ordinance be struck down and development proceed apace, the value of appellants' land would decrease accordingly, if the significance of the scenic views is to be accepted as alleged in the complaint. It is not surprising, then, that the thrust of appellants' argument is not that the ordinance should

be struck down, but that the City should be compelled to buy their land at the value it enjoys as property surrounded by landscape uncluttered by structures built for the profit of other property owners. The ordinance at issue here is, in sum, an excellent example of a regulation that "applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 147 (1978), quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

Moreover, it may also be noted that the complaint nowhere alleges that, at the time appellants purchased the parcel in question, it was zoned for a residential dwelling density significantly different from the maximum density allowed under the ordinance here challenged. If, for example, the parcel had previously been zoned for one single-family dwelling and associated buildings per acre, then the only loss appellants could allege would be loss of the right to build at that density without meeting special planning requirements. (See Appendix C to brief amici curiae of the Conservation Foundation, *et al.*) The failure to make any such allegation in the complaint represents a serious deficiency, since appellants may not properly be found to have been deprived of property rights they did not possess before the challenged ordinance was enacted.

In sum, appellants' complaint, read in its entirety, makes none of the factual allegations that, under relevant decisions of this Court, might be indicative

of a taking without just compensation within the meaning of the Fifth Amendment. The California Supreme Court thus properly affirmed the dismissal of the complaint on the City's demurrer; and, because the only other distinct issue raised by appellants here is a question of remedy that this Court need not reach if it finds that the ordinance does not constitute a taking, the Court may find it appropriate to dismiss the appeal for want of a substantial federal question.

II. THE FIFTH AND FOURTEENTH AMENDMENTS DO NOT REQUIRE THAT A STATE COURT AFFORD A REMEDY IN DAMAGES IF PLAINTIFFS ALLEGE AND PROVE THAT A ZONING ORDINANCE CONSTITUTES AN UNCONSTITUTIONAL TAKING OF THEIR PROPERTY, WHERE THE REMEDIES OF DECLARATORY RELIEF AND MANDAMUS ARE AVAILABLE

A. Introduction

Appellants contend that when a state court determines that a zoning ordinance has so exceeded the limits of the police power as to constitute an unconstitutional taking of property, the court is not free to limit the plaintiffs to declaratory relief and mandamus but must afford them the right to recover damages on a theory of inverse condemnation. Appellants' position rests on the arguments (1) that the enactment of a law that is intended to regulate uses of property, but that is deemed invalid by a court because its operation would destroy all beneficial use of affected property, is the equivalent of an authorized exercise of the power of eminent domain (App.

Br. 15-21); (2) that the equitable remedies available in the California courts for claims like those made in the present case are inadequate (App. Br. 44-55); and (3) that policy considerations militate in favor of requiring the California courts to afford plaintiffs in appellants' position a damages remedy (App. Br. 41-43). Appellants further assert (App. Br. 31-41) that decisions of this Court support their position that they are constitutionally entitled to damages in "inverse condemnation" once they have shown a regulatory measure to be invalid under the Takings Clause.

As we show below, however, an invalid police power measure regulating uses of private property cannot properly be equated with an exercise of the power of eminent domain; contrary to appellants' contention, the decisions of this Court do not establish the propriety of that equation. As we further show, this case fits within the general rule that state courts need not offer any particular remedy for violation of a federal right, so long as the remedies they afford are adequate; and the remedies available in the California courts in suits like the present case *are* constitutionally adequate. Finally, even though this Court perhaps need not decide which remedies, as a matter of policy, would best serve the interests of local governments as parties in state court actions, it seems evident that it is distinctly *not* in the interest of local governments to permit landowners who successfully challenge land use regulations as takings to compel the purchase of their lands by governing bodies that have chosen only to regulate land uses.

We note at the outset, however, that it is not entirely clear that no form of damages is ever available in the California courts to those challenging regulatory measures as takings. In the present case, the California Supreme Court stated only (J.S. App. 1) that when a landowner establishes that a zoning ordinance is constitutionally infirm because it "substantially limits use of his property" he "may not recover damages on the theory of inverse condemnation." [13] In an earlier decision, *HFH, Ltd.* v. *Superior Court of Los Angeles County*, 15 Cal. 3d 508, 517-520, 542 P. 2d 237, 244-245, 125 Cal. Rptr. 365, 372-373 (1975), cert. denied, 425 U.S. 904 (1976), in which the California Supreme Court expressly considered the question whether "*interim* damages" (*i.e.*, damages to compensate for economic losses suffered before a zoning ordinance is invalidated by a court) might be awarded to plaintiffs who showed a reduction in the market value of property induced by zoning, the Court concluded that such damages would not be available on that showing because a diminution in value, alone, does not prove a taking; but the court did not address the question whether such a damage claim might be added to a "mandate action" where facts showing a taking were established. 15 Cal. 3d at 519-520, 542 P. 2d at 245, 125 Cal. Rptr. at 373. See also 15 Cal. 3d at 516 n.14, 542 P. 2d at 243 n.14,

[13] Because the California Supreme Court found the ordinance at issue here valid, its discussion of the remedy question is technically dictum rather than holding, albeit well considered dictum.

125 Cal. Rptr. at 373 n.14.[14] In addition, the California Supreme Court has not necessarily foreclosed the possibility of a damages remedy where landowners sue in a state court under 42 U.S.C. 1983, alleging that a zoning ordinance deprives them of their constitutionally protected property rights under color of state law. The California Supreme Court has held that state courts must entertain Section 1983 actions (*Brown* v. *Pitchess*, 13 Cal. 3d 518, 531 P. 2d 772, 119 Cal. Rptr. 204 (1975)), and the court has not had occasion to decide what remedies are available where claims similar to those brought by appellants in the present case are raised under that federal statute.[15] Of course, it is likely that the California court

[14] In *HFH, Ltd.*, the California Supreme Court treats the issue of the availability of damages based on an inverse condemnation theory as separate from the issue of the availability of interim damages as part of a writ of mandate (see Cal. Civ. Proc. Code § 1095 (West Cum. Supp. 1980)). In discussing the latter issue, the California court did suggest that the state tort immunity statute (Cal. Gov't Code § 818.2 (West 1966)) would preclude liability for interim damages based on a claim analogous to state tort law, but avoided addressing the question of the propriety of liability for interim damages (such as holding costs) if such a claim was of constitutional dimension. Courts in California have given no indication that the state tort immunity statute would preclude a damage claim as part of a writ of mandate if it ever was constitutionally required. See *Graham* v. *City of Biggs*, 96 Cal. App. 3d 252, 157 Cal. Rptr. 761 (Ct. App. 1979) (state tort immunity statute inapplicable to action brought under Section 1983); *Rossiter* v. *Benoit*, 88 Cal. App. 3d 706, 152 Cal. Rptr. 65 (1979) (requirements of state tort claims inapplicable to Section 1983 claim).

[15] In any event, whether a damage action is based on Section 1983 or directly on the Constitution, it is possible that the City

would conclude that at least the "inverse condemnation" damages remedy is unavailable there for the same reasons it found it unavailable in the present case. See *Jacobson* v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901 (D. Nev. 1979) (federal court holding that "damages for inverse condemnation" are unavailable in challenge to land use law under 42 U.S.C. 1983).

In these circumstances, this Court may deem it premature to decide now whether a damages remedy must, as a matter of federal constitutional law, be made available to those challenging land use regulations as takings in state courts. See *Phyle* v. *Duffy*, 334 U.S. 431 (1948).

B. A Zoning Ordinance Deemed Invalid as a Taking of Property without Compensation is Not the Equivalent of an Exercise of the Power of Eminent Domain

Appellants' claim of entitlement to damages in "inverse condemnation" appears to be essentially a claim "based on the right to recover just compensation for property taken by [the City] for public use in the exercise of its power of eminent domain" (*Jacobs* v. *United States*, 290 U.S. 13, 16 (1933)). This Court

---

would enjoy immunity either under state or federal immunity law. This Court has decided neither the extent, if any, to which state law immunity could bar a federal constitutional claim (*see Ferri* v. *Ackerman*, No. 78-5981 (Dec. 4, 1979), slip op. 5 n.13; *Martinez* v. *California*, No. 78-1268 (Jan. 15, 1980), slip op. 7 n.11) nor the scope of any qualified immunity the City may enjoy under federal law for any good faith enactment of a regulation (see page 44, note 17, *supra*).

has recognized two ways in which a government, the United States, for example, may exercise that power (*United States* v. *Dow*, 357 U.S. 17, 21 (1958)):

> Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act. 28 U.S.C. §§ 1346(a)(2) and 1491, to recover just compensation. See *Hurley* v. *Kincaid*, 285 U.S. 95, 104. Under the second procedure the Government may either employ statutes which require it to pay over the judicially determined compensation before it can enter upon the land, * * * or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained.

See also *United States* v. *Clarke*, No. 78-1693 (Mar. 18, 1980), slip op. 2-3; *United States* v. *Dickinson*, 331 U.S. 745, 747-748, 749 (1947). Appellants are proposing a third way in which the eminent domain power may be exercised: the enactment of a regulatory measure that is ultimately held by a court to be unconstitutional because, if enforced, it will deprive a landowner of any reasonable beneficial use of his property without compensating him for the deprivation. Appellants further propose (App. Br. 9) that

such an enactment gives the affected property owners a "cause of action" in "inverse condemnation."

Appellants' argument has two basic fallacies. First, their use of the term "inverse condemnation" confuses their cause of action—*i.e.*, a claim that the City has violated their rights under the Fifth and Fourteenth Amendment by depriving them of substantially all beneficial use of their property without compensation —with the remedy they seek—*i.e.*, money damages. The two are not the same: the cause of action may exist without regard to what relief is requested or granted. See *Davis* v. *Passman*, 442 U.S. 228, 239-240 & n.18 (1979). Second, appellants overlook a vital distinction between the enactment of a law regulating the uses of property and the two types of government action described in *United States* v. *Dow*, *supra*. It is logical to speak of "the *choice* of the condemning authority to take property by physical invasion" or "by a formal condemnation action" (*United States* v. *Clarke*, *supra*, slip op. 5 (emphasis supplied)) and to award compensation for the property thus taken. In the former case, the government has appropriated property in a manner that precludes its return, giving rise to an implied promise to pay if the appropriation of property is authorized by a valid statute (see *Dugan* v. *Rank*, 372 U.S. 609, 619-623 (1963); *Hooe* v. *United States*, 218 U.S. 322, (1910)). In the latter, of course, the government has expressly announced its intention to pay by filing the proceeding.

Where a legislative body has enacted a regulatory measure such as a zoning ordinance, however, it has

in effect announced a decision to define property rights rather than to acquire them. A government may, up to a point, validly "cut down" property rights without paying where the restriction on such rights is substantially related to the public welfare. *Block* v. *Hirsh*, 256 U.S. 135, 155 (1921). When the government cuts them down unreasonably, one may call the result a taking of property; but it is unreasonable to speak of the government's "choice" to acquire the property or its implied promise to pay compensation. Instead, when a court determines that a regulatory measure is invalid as a "taking," a government is then faced with a different choice: it may continue to restrict the rights and pay for them, or it may forego restricting the rights.

Appellants seek to present their position as one that offers a government flexibility and minimal intrusion by the judiciary (App. Br. 36-43), but the effect of recognizing their claim of constitutional entitlement to this damages remedy is in fact to deprive a government of that choice. Invalidation of the regulation would leave a government with the option of filing appropriate condemnation proceedings, reenacting the measure with a compensation provision, or abandoning the effort to restrict the rights. Appellants would have courts disregard the government's choice and force it to purchase the affected property.

The decisions of the Court principally relied on by appellants fail to support their position. As appellants freely concede (App. Br. 31-34), in most of the decisions of this Court concerned with regulatory measures challenged as takings, injunctive relief

rather than money damages had been sought, and in none of the cases has monetary relief been awarded. The cases in which damages have been awarded are, with one exception discussed below (page 37), physical seizure cases. Moreover, several of those decisions contain language indicative of this Court's sensitivity to the question of a government's choice. *Dugan* v. *Rank*, *supra*, *Fresno* v. *California*, 372 U.S. 627 (1963), and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), all involved the actual diversion of water from the lands of private owners; and *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), concerned a claim that plaintiff's lands would be flooded as a result of the construction of a federal floodway project. Even though *Gerlach*, like the others, was a case of taking by seizure, the Court carefully avoided the question of any constitutional entitlement to damages and found instead that Congress intended to pay for the state-defined water rights involved. As the Court explained (339 U.S. at 739): "Congress realistically elected to treat [the dam construction] as a reclamation project[,]" "to recognize any state-created rights and to take them under the power of eminent domain."

In *Hurley* v. *Kincaid*, *supra*, the Court denied the plaintiff's request for an injunction against construction of the floodway, but held that Congress had, in the Tucker Act, 28 U.S.C. 1346(a) and 1491, provided a remedy in damages should construction of the project go forward as authorized. The Court denied the injunction request in part because it would give plaintiff relief *before* any injury had been done (285 U.S. at 104); thus, even though plaintiff had alleged

that the very existence of the statute authorizing the project had placed a "cloud upon [his] title" and "materially affected and impaired the value thereof" (285 U.S. at 101 n.1), the Court found no entitlement to a remedy until the government had cast the die by commencing the project.

In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the Court was not dealing with a physical seizure, but in holding that the property owners concerned would be entitled to a remedy in damages should the statute in operation deprive them of full compensation for the property rights they were required to surrender, the Court was careful to determine that the granting of such a remedy would not be contrary to congressional intent. It satisfied itself that the Tucker Act remedy had not been withdrawn by Congress when enacting the Rail Reorganization Act (419 U.S. at 125-136, 148); and it further noted, in connection with both categories of takings alleged (*id.* at 129, 148), that the legislative history of the Rail Act indicated that Congress had *intended* to provide the minimum amount of compensation required for the act to be constitutionally valid. The Court did not hold that Congress could not constitutionally have withdrawn the Tucker Act and remitted the property owners to equitable remedies.

In the present case, the California Supreme Court has determined (J.S. App. 1) that state law provides no money damages "on the theory of inverse condemnation," and that conclusion is binding on this Court. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590

(1875). The ordinance in question, by its nature, indicates an intent on the part of the City to avoid reliance on the power of eminent domain; it was, moreover, enacted in response to a state statute that expressly declines to authorize a city or county to adopt an "open-space zoning ordinance in a manner" that would constitute a taking of property without compensation, (see Cal. Gov't Code § 65912 (West Supp. 1980)); accordingly, the City must have intended to avoid imposing any burdens on property owners that would give rise to compensation claims such as that made by appellants here. As we have argued in Point I, we think it clear that the ordinance is a reasonable exercise of the police power and does not constitute a taking; but if the City has misjudged the degree to which it may validly control the density of residential development without having to resort to proceedings under eminent domain, it should surely not be found to have impliedly agreed to purchase property the uses of which it sought only to regulate.

C. The Equitable Remedies Available in the California Courts are Adequate Remedies for Claims that a Zoning Ordinance Deprives a Landowner of Substantially All Beneficial Use of his Property

Appellants also suggest (App. Br. 44-45) that they are constitutionally entitled to a damages remedy because invalidation of the ordinance, if it were found to constitute a taking, would be an inadequate remedy for the constitutional violation. The argument represents at least implicit recognition of principles of federalism affording a state court broad discretion

in fashioning remedies for violations of federal rights, so long as the state court affords an adequate remedy. See generally Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969); Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181, 181-187, 191-193 (1969); Note, *State Remedies for Federally-Created Rights*, 47 Minn. L. Rev. 815, 830-834 (1963). Thus, this Court has interfered with a state court's choice of remedy for violation of a federal right only where the sole remedy offered in the state courts is wholly inadequate, in effect denying any relief for the violation. *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 682 (1930); *Ward* v. *Board of County Comm'rs*, 253 U.S. 17 (1920); *Poindexter* v. *Greenhow* [*The Virginia Coupon Cases*], 114 U.S. 270, 303 (1885). See also *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 237-242 & n.45 (1977) (discussing adequate remedies for constitutional violation without directing state court to adopt one in particular); *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966) (states free to develop adequate safeguards, other than that devised by the Court, to protect the privilege against self-incrimination during custodial interrogation); *Mapp* v. *Ohio*, 367 U.S. 643, 651-653 (1961) (exclusionary rule applied to use in state court proceedings of evidence seized in violation of the Fourth Amendment because other remedies had provided futile). Indeed, the fact that a state *offers* an adequate remedy amounts to an adequate state

ground for a decision even if the party seeking review in this Court was not accorded the remedy because he failed to apply for it. *Phyle* v. *Duffy*, 334 U.S. 431 (1948); *Woods* v. *Nierstheimer*, 328 U.S. 211, 214, 216 (1946); *Mellon* v. *McCafferty*, 239 U.S. 134 (1915).

Nothing in this Court's decisions suggests that the Constitution requires that a damages remedy be made available to those challenging zoning ordinances as takings. Indeed, this Court has moved with caution even in determining whether a damages remedy is *authorized* in suits, based directly on the Constitution, that are brought in federal courts against federal officials. Thus, it held in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971), that damages were an available remedy for a particular type of Fourth Amendment violation where there were "no special factors counselling hesitation in the absence of affirmative action by Congress." And in *Davis* v. *Passman*, *supra*, this Court found damages to be an appropriate remedy for a particular equal protection claim under the Due Process Clause of the Fifth Amendment where "there are available no other alternative forms of judicial relief" (442 U.S. at 245); but, as the Court noted (*id.* at 248), "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." Because, as we have shown above (pages 34-37), a suit challenging a regulatory measure such as a zoning ordinance is distinguishable from the physical seizure cases, in which " 'the self-executing character of the constitutional provision with respect to

compensation' " (*United States* v. *Clarke*, *supra*, slip op. 4) warrants a damages remedy, there is no reason for the Court to abandon its cautious approach respecting remedies in the present case.

The facts alleged in the appellants' complaint in no way suggest that, if the ordinance at issue here is determined to be a taking, the remedies of declaratory relief and mandamus would be inadequate as a matter of constitutional law.[16] A declaration that the ordinance is invalid would relieve appellants of the restrictions they contend have rendered their property worthless, and were the City, for example, to impose permit requirements that amounted to an attempt to evade the court's decision, the mandamus remedy would permit a court to compel issuance of the permits. Appellants' contention (App. Br. 44, 51) that the remedy is inadequate because the California courts refuse to give it, is not a criticism of the adequacy of the remedy, but an attack on the merits of decisions finding that particular ordinances do not amount to takings.

Appellants' suggestion (App. Br. 41-42) that the equitable relief specified by the California Supreme Court would, in any event, be inadequate to remedy

---

[16] It is perhaps for this reason that, in speaking of the alleged inadequacy of the remedy, appellants (App. Br. 44-53) dwell primarily on anecdotal accounts of cases involving other landowners and other laws and do not explain precisely why an order invalidating the ordinance at issue here would be inadequate to remedy any injury of constitutional dimensions they might be found to suffer, given the allegations of their complaint.

damage for any "temporary or partial taking" also finds no support in the allegations of their complaint. They allege that the ordinance and the publication of proposed City land use plans reduced the market value of their land to the point of worthlessness because it could not be developed or otherwise used (A. 7, 13). As we have shown (page 26, *supra*), other allegations of the complaint contradict that assertion; but, even assuming it were true, invalidation of the restrictions on development would remove the essential source of that injury. As we have also shown (pages 13, 18), diminution in market value is not an injury of constitutional dimensions, so compensation on that account would not be justified; and mere hopes of earning profits are similarly noncompensable. See *Mosca* v. *United States*, 417 F.2d 1382, 1386 (Ct. Cl. 1969); *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1010 (Ct. Cl. 1967) (Davis, J.). In any event, appellants did not contend before the California Supreme Court that they had alleged facts entitling them to such damages, and when they first raised the subject at all, in their petition for rehearing (App. Pet. Reh. 25-26), they discussed it only as an abstract proposition; accordingly the court below had no occasion to address the question (see pages 30-32, *supra*).

D. Public Policy Considerations Support the California Supreme Court's Determination of the Remedy Issue

If this Court reaches the choice of remedy issue and concludes, in agreement with our submission, that the choice made by the California Supreme Court

offends no federal constitutional provision, the Court's task is at an end. For the wisdom of the policy underlying such a state court determination is uniquely for that court system to decide. See Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954). Cf. *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966).

In any event, the California Supreme Court was surely correct in concluding (J.S. App. 9) that "policy considerations" favor "the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." As we have already remarked, acceptance of the "inverse condemnation" remedy urged by appellants would, contrary to their contentions (App. Br. 41-44), interfere with the freedom of a legislative body to decide whether and to what extent it wishes to effectuate its land use policies through the exercise of the power of eminent domain. If an ordinance is invalidated in whole or in part, the enacting body is free to enact an amended ordinance, proceed in eminent domain, or abandon its regulation of the land uses concerned. Compelled purchase not only restricts a government's options as to land use policy; it may create immediate budgetary problems that affect the government's ability to act in other areas. *Jacobson* v. *Tahoe Regional Planning Agency*, 474 F. Supp. 901, 903 (D. Nev. 1979); Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439, 1450-1451 (1974). Of course, if a government

prefers that its land use scheme not suffer disruptions through the invalidation remedy, it can draft its legislation with a view to providing for compensation where a court deems that essential to the constitutionality of the law. See F. Bosselman, D. Callies & J. Banta, *The Taking Issue* 303 (1973) (describing Dayton, Ohio, scheme for providing compensation in cases in which land use restrictions as applied to particular properties are deemed to constitute a taking).

Even local governments that are not compelled to purchase land contrary to legislative choice may suffer if the inverse condemnation remedy sought by appellants is made available in suits challenging zoning ordinances. As the California Supreme Court has recognized (J.S. App. 10-11), the very existence of the remedy may intimidate local governments in their community planning functions. *Jacobson* v. *Tahoe Regional Planning Agency*, *supra*, 474 F. Supp. at 903; Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439, 1450 (1974); Note, *Eldridge* v. *City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 Hastings L.J. 1569, 1597 (1977).[17]

[17] Similar considerations have led some courts to recognize a good faith immunity defense for cities and counties sued for governmental actions under 42 U.S.C. 1983. *Owen* v. *City of Independence*, 589 F.2d 335 (8th Cir. 1978), cert. granted, No. 78-1779 (Oct. 1, 1979) (argued Jan. 8, 1980); *Sala* v. *County of Suffolk*, 604 F.2d 207 (2d Cir. 1979), petition for cert. pending, No. 79-620. In *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), this Court held that cities and counties are liable to suit under Section 1983, but it did not decide whether a qualified immunity defense would be available to them in such actions. *Id.* at 713 n.9 (Powell, J., concurring).

Such inhibitions could, moreover, discourage state and local governments from participating in federal environmental programs that depend for their effectiveness on state and local implementation. The Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*, for example, which was enacted to mitigate the destructive effects of intense development pressures on coastal areas, is designed to encourage the States "to use their *full authority* over the lands and waters in the coastal zone by assisting the states in developing land and water use programs for dealing with coastal land and water use decisions of more than local significance." Section 302(c), 16 U.S.C. 1451(c) (emphasis supplied). Under Section 305 of the Act, 16 U.S.C. 1454, grants made by the National Oceanic and Atmospheric Administration have financed up to 80% of the development costs of approved programs over the last five years. The threat of financial liability of uncertain dimensions in suits brought by landowners affected by development restrictions imposed through these federally assisted programs could discourage the development of new programs and encourage some states to revise existing programs for fear of the mere possibility that a court might deem some restriction to be a taking. The objectives of Congress in enacting the Coastal Zone Management Act would, accordingly, be

seriously undermined. See also Comment, *The Clean Water Act and Related Developments in the Federal Water Pollution Control Program During 1977*, 2 Harv. Envt'l L. Rev. 103, 178-180 (1978) (state and local land use controls in federally assisted programs under Section 208(b)(2)(F)-(H) of the Clean Water Act, 33 U.S.C. 1288(b)(2)(F)-(H)).

In sum, neither logic, precedent, nor policy considerations support appellants' contention that they are constitutionally entitled, on any theory, to a damages remedy should the zoning ordinance at issue here be deemed a taking. Should the Court reach the remedy issue, however, it may wish to confine itself to the only question discussed by the California Supreme Court: whether the Constitution requires that a landowner who successfully challenges a zoning ordinance as a taking be allowed to recover damages on a theory of inverse condemnation.

CONCLUSION

Either the appeal should be dismissed for want of a substantial federal question or the judgment of the California Supreme Court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

JACQUES B. GELIN
RICHARD JAMES LAZARUS
Attorneys

APRIL 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 317066 275